

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**ELIOT RECYCLING SERVICES
LLC,**

Respondent.

**Docket No. FMCSA-2007-0105¹
(Eastern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On September 25, 2007, the Maine Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) against Eliot Recycling Services, LLC (Respondent) following a compliance review conducted on July 11, 2007. The NOC charged Respondent with: (1) two violations of 49 CFR 382.303(a), failing to conduct post-accident alcohol testing for each surviving driver, with a proposed civil penalty of \$1,650 per count; (2) two violations of 49 CFR 382.303(b), failing to conduct post-accident controlled substances testing for each surviving driver, with a proposed civil penalty of \$1,650 per count; and (3) one violation of 49 CFR 391.51(b)(7), failing to maintain a medical examiner's certificate in a driver's qualification file, with a proposed civil penalty of \$660. The NOC proposed a total civil penalty of \$7,260.

After Respondent failed to respond to the NOC, the FMCSA's Field Administrator for the Eastern Service Center (Claimant) served a Notice of Default and Final Agency Order (NDFAO) on October 31, 2007. The NDFAO advised Respondent that the NOC would become

¹ The prior case number was ME-2007-0065-US1159.

the Final Agency Order in this proceeding effective November 5, 2007, with the civil penalty immediately due and payable on that date.

Respondent replied to the NOC on November 2, 2007. It admitted the violations, stated that all violations had been corrected and requested binding arbitration regarding the amount of the civil penalty and the terms of payment. Claimant moved for entry of an order of default declaring the NOC, including the civil penalty, as the final order in the proceeding. Claimant's objection and motion were based on the argument that Respondent's reply to the NOC was not timely filed in accordance with the Agency's Rules of Practice. Respondent did not reply to the Motion.

By Final Order served July 6, 2010, I granted Claimant's Motion for Default, holding that the time limit for replying to an NOC is jurisdictional and may only be modified if a respondent requests, and is granted, an extension of time.² Because Respondent did not request an extension of time and did not file a timely reply under § 386.14(a), I found that it defaulted.

On July 22, 2010, Respondent filed a Petition for Reconsideration of the Final Order, claiming that on November 2, 2007 its representative, Linda Corbin, was told by John Sharp, an Eastern Service Center employee, that "it would be okay [to submit a response to the NOC] as long as she faxed the response to the NOC immediately." Ms. Corbin asserted that she faxed and mailed the response to the NOC within an hour after her conversation with Mr. Sharp.

On August 12, 2010, Claimant responded to the Petition for Reconsideration. Claimant asserted that the time limits for replying to an NOC are jurisdictional in nature and cannot be modified except by a request for an extension of time. Claimant contended that under 49 CFR

² See *In the Matter of Lonestar C.C.*, Docket No. FMCSA-2002-11281, Order Lifting Stay, February 22, 2002.

386.5(f), a stipulation for an extension of time to reply to an NOC must be filed in the docket and served on all parties, and that no such stipulation or motion for an extension of time was filed in this case. Claimant also noted that Respondent had the opportunity to raise its defense in response to the Motion for Default but failed to do so and that Respondent has failed to meet its burden of demonstrating that the July 6, 2010 Final Order should be vacated.

2. Decision

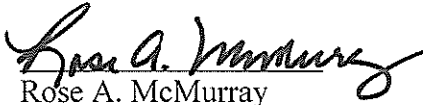
Respondent has not demonstrated any error that would warrant vacating the Final Order. Ms. Corbin's alleged conversation with Mr. Sharp took place after the NOC reply deadline had expired. At that point in time, Respondent was already in default and an NDFAO had been issued. Accordingly, it was too late for the parties to agree to an extension. Therefore, even if Mr. Sharp misadvised Ms. Corbin regarding the acceptability of a late-filed reply, it did not change the fact that Respondent waited until after issuance of the NDFAO to respond to the NOC and offered no explanation for its failure to timely reply or timely request an extension. Consequently, Ms. Corbin's November 2, 2007 discussion with Mr. Sharp and her subsequent filing of an untimely reply to the NOC is not germane to the issue of whether Respondent defaulted.³

The Petition for Reconsideration is denied. The civil penalty of \$7,260 is due and payable immediately. Payment may be made electronically through FMCSA's registration site at <http://safer.fmcsa.dot.gov> by selecting "Online Fine Payment" under the "FMCSA Services"

³ Claimant's argument that a stipulation for an extension of the NOC reply time is subject to the filing requirements of § 386.5(f) is misplaced. Section 386.5(f) requires filing of stipulations for extension of time in the docket only if a matter is already pending before the Assistant Administrator, which is not the case after an NOC is issued and a reply has not yet been submitted. See *In the Matter of Rapid Logistics, LLC*, Docket No. FMCSA-2008-0113, Order Closing Docket, June 10, 2008.

category. In the alternative, payment by cashier's check, certified check, or money order may be remitted to the Claimant at the address shown in the Certificate of Service.

It Is So Ordered.



Rose A. McMurray

Assistant Administrator

Federal Motor Carrier Safety Administration

9.3.10

Date

CERTIFICATE OF SERVICE

This is to certify that on this 1 day of September, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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